

## Judgment of the Court of Appeal

(1) Avonwick Holdings Limited  
(2) Jeremy Mark Willmont & Emma Sayers  
(as the joint trustees of Mikhail Shlosberg)  
- and -  
Mikhail Shlosberg

[2016] EWCA Civ 1381

### Court of Appeal unanimously upholds landmark ruling in relation to legal professional privilege

By [Joel Seager](#) & [Max Hotham](#)

#### Summary

On 18 November 2016, the Court of Appeal unanimously upheld a first instance judgment of Mr Justice Arnold that will be of interest to all insolvency practitioners. The judgment, by way of high level summary, means that a bankrupt's legal professional privilege does not vest in trustees in bankruptcy and accordingly, trustees cannot waive that bankrupt's privilege in the documents and information that come into their possession. However, after taking possession, trustees can make use of such documentation and information so long as it does not amount to a waiver of privilege and it falls within the discharge of their statutory functions.

In reaching this decision, the Court of Appeal discussed the competing public interest policies between trustees in bankruptcy getting in and realising and distributing a bankrupt's estate under the Insolvency Act 1986 and a person's ability to consult their lawyer in confidence and have the right to assert legal professional privilege. The judgment reached finds that the latter principle overwhelmingly prevailed.

In doing so, the Court of Appeal ultimately found in favour of Enyo Law's client, Mr Shlosberg.

#### Background

Mr Shlosberg, a bankrupt, brought an application against his main creditor ('Avonwick'), his joint trustees in bankruptcy both from the firm Moore Stephens LLP ('Trustees') and Dechert LLP ('Dechert') which acted on behalf of both Avonwick and the Trustees. The Trustees had passed to Dechert documents that they received from Mr Shlosberg's former solicitors that were subject to legal professional privilege. The Trustees wanted to permit Avonwick to make use of those documents in a conspiracy claim it (with others) was bringing against Mr Shlosberg and others. Mr Shlosberg sought an order requiring Dechert to cease acting for Avonwick on the basis that the individual solicitors involved had reviewed material which contained his privileged information. The Respondents argued that the benefit of the privilege vested in the Trustees as part of Mr Shlosberg's bankrupt estate.

#### First instance judgment of Mr Justice Arnold ([available here](#))

As a result of the Respondents' assertions that Mr Shlosberg's privilege had passed to the Trustees, Mr Justice Arnold stated that the burden to demonstrate that fell on the Respondents. Four key arguments were advanced by the Respondents, namely that:

- Title to the pieces of paper recording the privileged information formed part of Mr Shlosberg's estate – accordingly, the Trustees had acquired the benefit of that privilege as successors in title to that property;
- The privilege itself formed part of Mr Shlosberg's estate – whether because it was "property" for the purposes of section 436(1) of the Insolvency Act 1986 ('the Act'), or because it was a "*power exercisable over or in respect of property*" for the purposes of section 283(4) of the Act;
- Documents falling into a certain category had resulted in a judgment for damages in Mr Shlosberg's favour, and that judgment debt was property for the purposes of section 436(1) of the Act; and
- The remainder of the privileged documents related to an "obligation" of Mr Shlosberg – namely the judgment in favour of Avonwick – and that obligation formed part of Mr Shlosberg's estate as it was "property" for the purposes of section 436(1) of the Act.



In response, Mr Shlosberg's Counsel argued, amongst other things, that privilege did not amount to "property" for the purposes of section 436(1) of the Act nor a power exercisable over or in respect of property.

Mr Justice Arnold concluded that the steps taken by Dechert to safeguard Mr Shlosberg's privileged material were inadequate, and that an injunction should be granted requiring Dechert to cease acting for Avonwick. Avonwick and the Trustees appealed the decision.

## The Appeal

The Appeal took place on 25 and 26 October 2016 before Sir Terence Etherton MR and Lady Justices Gloster and Sharp. At the Appeal, the key issues considered were:

- Whether privilege fell within the definition of "property" in section 436(1) of the Act, and therefore vested in the Trustees;
- Parliament's intention when drafting the wording of section 311(1) of the Act (in particular, the words "including any which would be privileged from disclosure in any proceedings"); and
- Whether, even if Mr Justice Arnold was otherwise correct, he was wrong to order that Dechert should cease acting for Avonwick.

## Outcome of the Appeal

In a judgment handed down on 18 November 2016 (available [here](#)), the Court of Appeal unanimously upheld the first instance decision:

- It held that on the proper interpretation of the relevant provisions of the Act, privilege was not "property" of a bankrupt which automatically vested in the Trustees. A bankrupt could only be deprived of privilege if the Act expressly so provides or it is a necessary implication of the express language of its provisions (following *Morgan Grenfell* and *Simms*<sup>1</sup>) said so, given that privilege was a fundamental human right;
- Whilst the Trustees can take possession and make use of privileged documentation and information contained in it for the purpose of getting in and realising the bankrupt's estate, they cannot do so in a way which would amount to a waiver of the bankrupt's privilege, which is a fundamental right (following *Derby Magistrates*,<sup>2</sup> *Simms* and *Morgan Grenfell*); and
- Mr Justice Arnold's decision was not plainly wrong or outside the ambit of a proper exercise of judicial direction.

This decision could have a far-reaching effect on bankruptcies depending on the present conduct of trustees. As the court has re-enforced and sought to protect a person's fundamental right to legal professional privilege, trustees must only use the privileged documentation and information that come into their possession in a way that does not compromise that fundamental right.

Enyo Law instructed Philip Marshall QC and James Mather of Serle Court on behalf of Mr Shlosberg.

<sup>1</sup> *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563; *R v Secretary of State for the Home Department ex. p. Simms* [2000] 2 AC 115.

<sup>2</sup> *R v Derby Magistrates' Court ex. p. B* [1996] 1 AC 487.

## For further information on the judgment please contact:

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